

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROBERT J. MILLER,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
 Commissioner of Social Security,

Defendant.

Case No. 2:17-cv-02613-JAD-BNW

REPORT AND RECOMMENDATION

The case involves review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Robert Miller’s (Plaintiff’s) application for disability insurance benefits under Titles II and XVI of the Social Security Act. The court reviewed Plaintiff’s Motion for Reversal and/or Remand (ECF No. 18), filed April 27, 2018, and Defendant’s Cross Motion to Affirm and Opposition to Plaintiff’s Motion for Reversal and/or Remand (ECF Nos. 19, 20), filed May 25, 2018. Plaintiff did not file a reply. This matter was referred to the undersigned magistrate judge on May 6, 2019 for a report of findings and recommendations under 28 U.S.C. § 636(b)(1)(B)-(C) and Local Rule IB 1-4.

I. BACKGROUND

A. Procedural History

In September 2013, Plaintiff applied for disability insurance benefits and supplemental security income under Titles II and XVI of the Act, alleging an onset date of October 1, 2012. AR¹ 273, 275. The Commissioner denied Plaintiff’s claims initially and upon reconsideration. AR

¹ AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 11).)

1 189-93, 196-201. The Administrative Law Judge (ALJ) held hearings on October 20, 2015, and
2 June 6, 2016. AR 39-82, 83-123. On September 14, 2016, the ALJ issued a decision finding
3 Plaintiff was not disabled. AR 19-38. On November 14, 2016, Plaintiff requested that the Appeals
4 Council review the ALJ's decision. AR 271-72. The Appeals Council denied this request on
5 August 15, 2017, making the ALJ's decision the Commissioner's final decision. AR 1-6. On
6 October 6, 2017, Plaintiff commenced this action for judicial review under 42 U.S.C. §§ 405(g).
7 (See ECF No. 1.)

8 **B. The ALJ Decision**

9 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R. §§
10 404.1520 and 416.920.

11 At step one, the ALJ determined that Plaintiff did not engage in substantial gainful activity
12 since October 1, 2012. AR 24.

13 At step two, the ALJ found that Plaintiff had the following severe impairments:
14 degenerative disc disease of the lumbar spine, congenital nystagmus, and right knee pain. *Id.*

15 At step three, the ALJ determined Plaintiff did not have an impairment or combination of
16 impairments that met or medically equaled an impairment listed in 20 C.F.R., Part 404, Subpt. P,
17 App. 1 (the listings). AR 27.

18 Next, the ALJ found that Plaintiff retained the residual functional capacity (RFC) to lift
19 and/or carry 25 pounds occasionally, 20 pounds frequently; stand and/or walk for four hours in an
20 8-hour workday and sit for six hours in an 8-hour workday. The ALJ found that Plaintiff could
21 not occasionally climb ladders, ropes, or scaffolds, but could occasionally climb ramps and stairs,
22 stoop, kneel, crouch, and crawl. The ALJ further found that Plaintiff had limited depth perception
23 for distance and speed and needed to avoid concentrated exposure to vibrations and hazards.
24 Finally, the ALJ found that Plaintiff may need a cane to walk on uneven surfaces and for
25 prolonged distances but is able to carry small objects in his other hand. *Id.*

26 At step four, the ALJ found that Plaintiff could not perform past relevant work. AR 30.

27 At step five, and with the assistance of the vocational expert, the ALJ found that there
28 were jobs existing in significant numbers that someone with Plaintiff's vocational profile could

1 perform. AR 31-32. The ALJ therefore found Plaintiff “not disabled” as defined in the Act. AR
2 32.

3 **II. DISCUSSION**

4 **A. Standard of Review**

5 Administrative decisions in social security disability benefits cases are reviewed under 42
6 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)
7 states:

8 Any individual, after any final decision of the Commissioner of Social Security
9 made after a hearing to which he was a party, irrespective of the amount in
10 controversy, may obtain a review of such decision by a civil action . . . brought in
the district court of the United States for the judicial district in which the plaintiff
resides.

11 42 U.S.C. § 405(g). The court may enter “upon the pleadings and transcript of the record, a
12 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
13 with or without remanding the cause for a rehearing.” *Id.* The Ninth Circuit reviews a decision
14 affirming, modifying, or reversing a decision of the Commissioner de novo. *See Batson v.*
15 *Commissioner*, 359 F.3d 1190, 1193 (9th Cir. 2004).

16 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
17 *See* 42 U.S.C. § 405(g); *see Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
18 2006). However, the Commissioner’s findings may be set aside if they are based on legal error or
19 not supported by substantial evidence. *See Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir.
20 2005); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines
21 substantial evidence as “more than a mere scintilla but less than a preponderance; it is such
22 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
23 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d
24 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner’s findings are
25 supported by substantial evidence, the court “must review the administrative record as a whole,
26 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
27 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80
28 F.3d 1273, 1279 (9th Cir. 1996).

Under the substantial evidence test, findings must be upheld if supported by inferences reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support more than one rational interpretation, the court must defer to the Commissioner’s interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec’y of Health and Human Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether the Commissioner could reasonably have reached a different conclusion, but whether the final decision is supported by substantial evidence. It is incumbent on the ALJ to make specific findings so that the court does not speculate as to the basis of the findings when determining if the Commissioner’s decision is supported by substantial evidence. Mere cursory findings of fact without explicit statements as to what portions of the evidence were accepted or rejected are insufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ’s findings “should be as comprehensive and analytical as feasible and, where appropriate, should include a statement of subordinate factual foundations on which the ultimate factual conclusions are based . . .” *Id.* (citing *Baerga v. Richardson*, 500 F.2d 309, 312 (3d Cir. 1974), cert. denied, 420 U.S. 931 (1975).).

B. Disability Evaluation Process

The individual seeking disability benefits has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must demonstrate the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual must provide “specific medical evidence” in support of his claim for disability. 20 C.F.R. § 404.1514. If the individual establishes an inability to perform his prior work, then the burden shifts to the Commissioner to show that the individual can perform other substantial gainful work that exists in the national economy. *Reddick*, 157 F.3d at 721.

The ALJ follows a five-step sequential evaluation process in determining whether an individual is disabled. *See generally* 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any step the ALJ determines that he can make a finding of disability or nondisability,

1 a determination will be made, and no further evaluation is required. *See* 20 C.F.R. §
 2 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to
 3 determine whether the individual is engaged in substantial gainful activity (SGA). 20 C.F.R. §
 4 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves
 5 doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If
 6 the individual is engaged in SGA, then a finding of “not disabled” is made. *See Barnhart*, 540
 7 U.S. at 24. If the individual is not engaged in SGA, then the analysis proceeds to step two. *See id.*
 8 Step two addresses whether the individual has a medically determinable impairment that is severe
 9 or a combination of impairments that significantly limits him from performing basic work
 10 activities. 20 C.F.R. § 404.1520(c). An impairment or combination of impairments is not severe
 11 when medical and other evidence establishes only a slight abnormality or a combination of slight
 12 abnormalities that would have no more than a minimal effect on the individual’s ability to work.
 13 *Id.* § 404.1521; *see also* SSR 16-3p, 2017 WL 5180304 (Oct. 25, 2017); SSR 85-28, 1985 WL
 14 56856 (Jan. 1, 1985).² If the individual does not have a severe medically determinable impairment
 15 or combination of impairments, then a finding of “not disabled” is made. If the individual has a
 16 severe medically determinable impairment or combination of impairments, then the analysis
 17 proceeds to step three.

18 Step three requires the ALJ to determine whether the individual’s impairment or
 19 combination of impairments meet or medically equal the criteria of an impairment listed in 20
 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the
 21 individual’s impairment or combination of impairments meet or equal the criteria of a listing and
 22 the duration requirement (20 C.F.R. § 404.1509), then a finding of “disabled” is made. 20 C.F.R.
 23 § 404.1520(h). If the individual’s impairment or combination of impairments does not meet or
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 27 ² SSRs constitute the SSA’s official interpretation of the statute and regulations. *See Bray v.*
 28 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. §
 402.35(b)(1). They are entitled to some deference if they are consistent with the Social Security
 Act and regulations. *Id.* at 1223-24 (finding ALJ erred in disregarding SSR 82-41).

1 equal the criteria of a listing or meet the duration requirement, then the analysis proceeds to step
2 four.

3 Before moving to step four, however, the ALJ must first determine the individual's
4 residual functional capacity (RFC), which is a function-by-function assessment of the individual's
5 ability to do physical and mental work-related activities on a sustained basis despite limitations
6 from impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p, 1996 WL 374184 (July 2,
7 1996). In making this finding, the ALJ must consider all the relevant evidence, such as all
8 symptoms and "the extent to which the symptoms can reasonably be accepted as consistent with
9 the objective medical evidence and other evidence." 20 C.F.R. § 404.1529(a); *see also* SSR 16-
10 3p, 2017 WL 5180304 (Oct. 25, 2017). To the extent that statements about the intensity,
11 persistence, or functionally limiting effects of pain or other symptoms are not substantiated by
12 objective medical evidence, the ALJ must make a finding on the credibility of the individual's
13 statements based on a consideration of the entire case record. The ALJ must also consider opinion
14 evidence in accordance with the requirements of 20 C.F.R. § 404.1527 and 20 C.F.R. § 416.927.

15 Step four requires the ALJ to determine whether the individual has the RFC to perform his
16 past relevant work (PRW). *See* 20 C.F.R. § 404.1520(f). PRW means work performed either as
17 the individual actually performed it or as it is generally performed in the national economy within
18 the last 15 years or 15 years before the date that disability must be established. *See* 20 C.F.R. §§
19 404.1560(b), 404.1565(a). In addition, the work must have lasted long enough for the individual
20 to learn the job and perform a SGA. *Id.* §§ 404.1560(b), 404.1565(a). If the individual has the
21 RFC to perform his past work, then a finding of "not disabled" is made. *Id.* § 404.1560(b)(3). If
22 the individual is unable to perform any PRW or does not have any PRW, then the analysis
23 proceeds to step five.

24 The fifth and final step requires the ALJ to determine whether the individual can do any
25 other work considering his RFC, age, education, and work experience. 20 C.F.R. § 404.1520(g).
26 If he can do other work, then a finding of "not disabled" is made. Although the individual
27 generally continues to have the burden of proving disability at this step, a limited burden of going
28 forward with the evidence shifts to the Commissioner. The Commissioner is responsible for

1 providing evidence that demonstrates that other work exists in significant numbers in the national
 2 economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

3 C. Analysis

4 1. Plaintiff's Appealed Symptom Claims

5 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons supported by
 6 substantial evidence in discrediting his symptom claims. (ECF No. 18 at 3-11.) Plaintiff argues
 7 that the ALJ relied on the following three reasons to find him not entirely credible, and that each
 8 reason is flawed: (1) a boilerplate statement that Plaintiff's symptom claims are not entirely
 9 consistent with the evidence in the record (*id.* at 6-7); (2) insufficient objective medical evidence
 10 substantiating Plaintiff's symptom claims (*id.* at 7-9); and (3) Plaintiff's allegedly conservative
 11 medical treatment (*id.* at 10). Accordingly, Plaintiff argues that the court should remand for an
 12 award of immediate benefits or, in the alternative, a correction of legal errors. (*Id.* at 11-12.)

13 The Commissioner responds by arguing that the ALJ properly evaluated Plaintiff's
 14 subjective complaints of pain. (ECF No. 19 at 4.) The Commissioner acknowledges that the ALJ
 15 may not reject a plaintiff's symptom claims based solely on a lack of substantiation in the medical
 16 evidence. (*Id.* at 6.) The Commissioner points out, however, that in this case, the ALJ also
 17 discredited Plaintiff's symptom claims based on inconsistencies between these claims and his
 18 conservative treatment and daily activities, and the fact that Plaintiff did not quit his last job due
 19 to his symptoms but instead was laid-off. (*Id.* at 8-10.) Accordingly, the Commissioner argues
 20 that the ALJ gave clear and convincing reasons (supported by substantial evidence) for
 21 discrediting Plaintiff's symptom claims. (*Id.* at 10.)

22 2. When Symptom Claims May Be Rejected

23 An ALJ engages in a two-step analysis to determine whether a claimant's testimony
 24 regarding subjective pain or symptoms is credible.³ "First, the ALJ must determine whether there
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26 ³ SSR 96-7p, the regulation that governed credibility determinations at the time of this decision,
 27 was superseded by SSR 16-3p in March 2016. SSR 16-3p "eliminat[es] the use of the term
 28 'credibility' [to] clarify that subjective symptom evaluation is not an examination of an
 individual's character." SSR 16-3p, available at 2016 WL 1119029, at *1 (Mar. 16, 2016).
 However, both regulations require an ALJ to consider the same factors in evaluating the intensity,

1 is objective medical evidence of an underlying impairment which could reasonably be expected to
 2 produce the pain or other symptoms alleged.” *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir.
 3 2012) (internal quotation marks omitted). “The claimant is not required to show that [the
 4 claimant’s] impairment could reasonably be expected to cause the severity of the symptom [the
 5 claimant] has alleged; [the claimant] need only show that it could reasonably have caused some
 6 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation
 7 marks omitted).

8 Second, “[i]f the claimant meets the first test and there is no evidence of malingering, the
 9 ALJ can only reject the claimant’s testimony about the severity of the symptoms if [the ALJ]
 10 gives ‘specific, clear and convincing reasons’ for the rejection.” *Ghanim v. Colvin*, 763 F.3d
 11 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). “General findings are
 12 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence
 13 undermines the claimant’s complaints.” *Id.*; *Thomas*, 278 F.3d at 958 (“[T]he ALJ must make a
 14 credibility determination with findings sufficiently specific to permit the court to conclude that
 15 the ALJ did not arbitrarily discredit claimant’s testimony.”).

16 In making an adverse credibility determination, the ALJ may consider, *inter alia*, (1) the
 17 claimant’s reputation for truthfulness; (2) inconsistencies in the claimant’s testimony or between
 18 his testimony and his conduct; (3) the claimant’s daily living activities; (4) the claimant’s work
 19 record; and (5) testimony from physicians or third parties concerning the nature, severity, and
 20 effect of the claimant’s condition. *Thomas*, 278 F.3d at 958-59.

21 The court is constrained to affirming the ALJ decision on a ground that the ALJ invoked
 22 in making his/her decision. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Stout*, 454 F.3d
 23 at 1054. The court cannot affirm the ALJ’s credibility decision based on evidence that the ALJ
 24 did not discuss. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

25 3. Whether the ALJ Erred in Rejecting Plaintiff’s Symptom Claims

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 28 persistence and limiting effects of an individual’s symptoms. *See id.* at *7; SSR 96-7p, 1996 WL 374186, at *3 (July 2, 1996).

1 Here, Plaintiff argues that the ALJ relied on three flawed reasons to find his symptom
2 claims not entirely credible. (ECF No. 18 at 7-11.)

3 First, Plaintiff faults the ALJ for making a boilerplate statement that Plaintiff's symptom
4 claims are not entirely consistent with the evidence in the record, asserting that the "conclusory
5 statement of the ALJ in this matter is wholly insufficient." (*Id.* at 6-7.) Had this statement been
6 the only statement the ALJ made about Plaintiff's credibility, Plaintiff would likely be correct that
7 this would be insufficient. However, since the ALJ explained its reasons for discrediting
8 Plaintiff's symptom claims (as discussed in more detail below), it was not error for the ALJ to
9 provide a succinct sentence conveying her conclusion.

10 Second, Plaintiff faults the ALJ for allegedly rejecting Plaintiff's symptoms claims
11 because they were not sufficiently supported by objective medical evidence in the record. (ECF
12 No. 18 at 7-9.) Had the ALJ rejected Plaintiff's symptom claims based solely on this ground, this
13 may also have been error. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (ALJ may
14 not discredit a claimant's symptom testimony and deny benefits solely because the degree of
15 symptoms alleged is not supported by objective medical evidence); *Bunnell v. Sullivan*, 947 F.2d
16 341, 346-47 (9th Cir. 1991) (same); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989) (same).
17 Again, however, the ALJ provided additional reasons for finding Plaintiff not entirely credible.
18 And because objective medical evidence is a relevant factor in determining the severity of a
19 claimant's symptoms and their disabling effects, it was not error for the ALJ to consider this.
20 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

21 Third, Plaintiff faults the ALJ for discrediting his symptom claims based on the
22 conservative nature of his treatment. (ECF No. 18 at 10.) Evidence of "conservative treatment" is
23 sufficient to discount a claimant's testimony regarding the severity of an impairment. *Parra v.*
24 *Astrue*, 481 F.3d 742 (9th Cir. 2007). Plaintiff does not seem to disagree with the law on this
25 point, but argues that the ALJ (1) did not cite any medical evidence that demonstrates that
26 Plaintiff's treatment as been "conservative;" (2) did not point to any more rigorous treatment that
27 doctors wanted Plaintiff to complete; and (3) is simply wrong because Plaintiff was taking
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1 narcotics, which, according to Plaintiff, is not a form of conservative treatment. (ECF No. 18 at
2 10.)

3 Plaintiff's arguments are unpersuasive. As an initial matter, the ALJ cited substantial
4 medical evidence demonstrating that Plaintiff's treatment has been conservative. (*See, e.g.*, AR
5 28, 29 (noting that Plaintiff's back pain was treated with just 10 mg of Lortab three times a week,
6 and Plaintiff's allegedly disabling vision problems could largely be corrected with a new pair of
7 glasses); *see also Batson*, 359 F.3d at 1193 (under the substantial evidence test, findings must be
8 upheld if supported by inferences reasonably drawn from the record); *Burch*, 400 F.3d at 679
9 (when the evidence will support more than one rational interpretation, the court must defer to the
10 Commissioner's interpretation).) Next, the court is not aware of any binding authority requiring
11 the ALJ to point to more aggressive treatment doctors wanted Plaintiff to complete (before
12 discrediting Plaintiff's symptom claims), and Plaintiff cites none. Finally, the court is similarly
13 unaware of any binding Ninth Circuit precedent on whether narcotics are considered
14 "conservative" treatment, and the parties have cited none. There is an unpublished Ninth Circuit
15 case (cited by the Commissioner) in which the court held that the ALJ gave clear and convincing
16 reasons for discrediting Plaintiff's symptom claims, including the fact that she responded to
17 conservative treatment that involved taking narcotics. *Huizar v. Comm'r of Soc. Sec.*, 428 F.
18 App'x 678, 680 (9th Cir. 2011). Accordingly, this court cannot hold, as a matter of law, that
19 taking narcotics automatically renders treatment "non-conservative." For all of these reasons, the
20 court cannot conclude that the ALJ erred in discrediting Plaintiff's symptom claims based on the
21 conservative nature of his treatment.

22 The ALJ also found that Plaintiff's ability to perform some activities of daily living was
23 inconsistent with his allegations of disabling symptoms. AR 30. The ALJ may consider a
24 claimant's activities that are inconsistent with reported symptoms. *Rollins*, 261 F.3d at 857. If a
25 claimant can spend a substantial part of the day engaged in exertional or non-exertional functions,
26 the ALJ may find these activities inconsistent with the reported disabling symptoms. *Fair*, 885
27 F.2d at 603; *Molina*, 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in
28 order to be eligible for benefits, the ALJ may discount a claimant's symptom testimony when the

1 claimant reports participation in everyday activities indicating capacities that are transferable to a
2 work setting” or when activities “contradict claims of a totally debilitating impairment.” *Molina*,
3 674 F.3d at 1112-13 (internal quotations and citations omitted).

4 Here, the ALJ found that Plaintiff can engage in activities of daily living that undermine
5 his allegations of disabling functional impairments. AR 30. The ALJ found that: Plaintiff reported
6 no problems with personal care; he did not need reminders to take care of personal needs or
7 grooming or to take medication. He prepared his own meals. He could drive, use public
8 transportation, and get rides. He could go out alone. He shopped in stores and was able to handle
9 finances. He did not need reminders to go places. He could follow spoken and written instructions
10 “ok” and could complete tasks. *Id.* (citing Exs. 5E, 8E). These findings are supported by the
11 record and undermine some of Plaintiff’s statements about the disabling nature of his condition.
12 “Although the evidence of [Plaintiff’s] daily activities may also admit of an interpretation more
13 favorable to [Plaintiff], the ALJ’s interpretation was rational, and ‘[w]e must uphold the ALJ’s
14 decision where the evidence is susceptible to more than one rational interpretation.’” *Burch*, 400
15 F.3d at 680–81. Further, Plaintiff waived any objection to this reason for discrediting his
16 symptom claims by failing to address it in his brief. *See Carmickle v. Comm’r, Soc. Sec. Admin.*,
17 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (failure to raise issue waives it).

18 Plaintiff also did not address the ALJ’s final reason for discrediting his symptom claims—
19 that Plaintiff did not stop working due to disabling symptoms but rather was laid-off. AR 30
20 (citing Ex. 2E). As the Commissioner points out (ECF No. 19 at 10), there is caselaw that
21 suggests that it is proper for an ALJ to consider whether a claimant lost prior jobs because of
22 disabling symptoms (or for other reasons) in assessing their symptom claims. *See, e.g., Drouin v.*
23 *Sullivan*, 966 F.2d 1255, 1258–59 (9th Cir. 1992) (in evaluating symptom claims, ALJ properly
24 considered the fact that the claimant did not lose either of her prior two jobs because of pain).
25 Accordingly, this is another reason the ALJ gave for discrediting Plaintiff’s claims of disabling
26 symptoms, and Plaintiff waived any objection to it. *See Carmickle*, 533 F.3d at 1161 n.2.

27 Thus, as discussed above, the ALJ provided clear and convincing reasons supported by
28 substantial evidence for discrediting Plaintiff’s symptom claims. And, even if the ALJ had erred

1 with respect to some of the reasons given for discrediting Plaintiff's symptom claims (which the
2 court does not find), this would be harmless error, as the ALJ provided other valid reasons for
3 discrediting Plaintiff's symptom claims (which Plaintiff waived the right to object to). *See*
4 *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115 (“[S]everal of our cases have held that
5 an ALJ’s error was harmless where the ALJ provided one or more invalid reasons for disbelieving
6 a claimant’s testimony, but also provided valid reasons that were supported by the record.”);
7 *Batson*, 359 F.3d at 1197 (holding that any error the ALJ committed in asserting one
8 impermissible reason for claimant’s lack of credibility did not negate the validity of the ALJ’s
9 ultimate conclusion that the claimant’s testimony was not credible).

10 **III. CONCLUSION AND RECOMMENDATION**

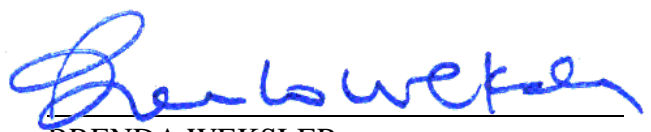
11 Accordingly, IT IS THEREFORE RECOMMENDED that Plaintiff’s Motion for Reversal
12 and/or Remand (ECF No. 18) be DENIED.

13 IT IS FURTHER RECOMMENDED that the Commissioner’s Cross Motion to Affirm
14 and Opposition to Plaintiff’s Motion for Reversal and/or Remand (ECF Nos. 19, 20) be
15 GRANTED.

16 **IV. NOTICE**

17 This report and recommendation is submitted to the United States district judge assigned
18 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
19 may file a written objection supported by points and authorities within fourteen days of being
20 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
21 objection may waive the right to appeal the district court’s order. *Martinez v. Ylst*, 951 F.2d 1153,
22 1157 (9th Cir. 1991).

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24 DATED: October 23, 2019

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27 BRENDA WEKSLER
28 UNITED STATES MAGISTRATE JUDGE